DISCUSSING *DEMKOVICH*: AN ANALYSIS OF WHY AND HOW THE SUPREME COURT SHOULD RECONSIDER THE EXPANSION OF THE MINISTERIAL EXCEPTION

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I. INTRODUCTION

Sandor Demkovich is one of the hundreds of thousands of ministerial employees who are employed in the estimated 350,000 religious congregations in the United States.[1] Demkovich's story is unsettling but not unique.[2] In 2012, Demkovich wore many musical hats in the Roman Catholic Church of St. Andrew the Apostle Parish in Calumet City as "music director, choir director, and organist."[3] As a gay man with ongoing health problems, including diabetes, metabolic syndrome, and weight issues, Demkovich was already facing his own personal trials when his employer began subjecting him to extensive ridicule.[4]

The primary instigator of this humiliation was Reverend Dada, who supervised Demkovich in his employment at the church.[5] Throughout Demkovich's employment at the church, the reverend repeatedly aimed "derogatory comments and demeaning epithets" toward Demkovich, specifically targeting his sexuality.[6] This treatment grew worse when the reverend discovered that Demkovich was planning to soon marry his male partner.[7] In addition to this harassment toward his sexuality, Demkovich also testified that the reverend "made belittling and humiliating comments" based on Demkovich's physical health conditions and appearance.[8] As one would suspect, the reverend's actions caused Demkovich both physical and mental harm, resulting in his decision to file a hostile work environment claim against the church.[9] In fact, Demkovich filed two different lawsuits alleging Title VII violations, claiming that his employment at the church had become a hostile work environment due to the reverend's behavior toward Demkovich's "sex, sexual orientation, and marital status."[10] The district court dismissed both of these lawsuits, claiming that the ministerial exception barred them, allowing only additional disability-based hostile work environment claims to proceed.[11] This pushed the Seventh Circuit to question the nature of the claims, whether they were subject to the ministerial

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1. *Fast Facts About American Religion*, HARTFORD INST. FOR RELIGION RSCH., http://hirr.hartsem.edu/research/fastfacts/fast_facts.html (last visited Apr. 5, 2022); Charita Goshay, *'Difficult Days Are Ahead' for America's Churches, Faith Institutions*, AKRON BEACON J. (Aug. 22, 2020, 5:30 AM), https://www.beaconjournal.com/story/news/local/2020/08/22/lsquodifficult-days-are-aheadrsquo-for-americarsquos-churches-faith-institutions/42282593/.

2. Goshay, *supra* note 1.

3. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 973 (7th Cir. 2021).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 974 (citing Demkovich v. St. Andrew the Apostle Par., 343 F. Supp. 3d 772, 786–87 (N.D. Ill. 2018)).

11. *Id.*

exception, and ultimately: who should be held responsible for this harm?[12] In the Seventh Circuit's opinion, no one.[13]

The split among circuits on the issue of hostile work environment claims arose from the ambiguous application of the ministerial exception resulting from the lack of guidance from the Supreme Court of the United States.[14] Since the Court officially recognized the constitutional legitimacy of the ministerial exception in *Hosanna-Tabor v. EEOC*, the federal courts have faced the uncertainty of the decision, which did very little to clarify the application of the ministerial exception.[15] Hostile work environment claims, specifically those concerning violations of Title VII, currently sit at the forefront of this uncertainty in the federal circuit courts.[16] The crux of the disagreement among the circuit courts is whether the adjudication of hostile work environment claims brought by ministers violates the Free Exercise and Establishment Clauses, collectively known as the Religion Clauses.[17] The Supreme Court notoriously places great emphasis on protecting religious entities and their right to freedom from governmental intervention.[18] However, the Court must extend an equal degree of protection to those employed by these religious entities because they are also entitled to work in a nonabusive environment.[19]

The Supreme Court articulated in *Hosanna-Tabor* that the ministerial exception served to protect religious entities' choices in choosing, hiring, and terminating their ministerial employees without fear of being sued for discrimination.[20] Such an interpretation of the ministerial exception does not encompass a categorical barring of hostile work environment claims. To correct the circuits that have decided to follow the opposing view, the Supreme Court must set a precedent of conducting a case-by-case analysis to preserve the integrity of all employees as well as the religious entities themselves.

II. THE RIGOR OF RELIGION: UNDERSTANDING THE CONTROVERSIAL NATURE OF THE MINISTERIAL EXCEPTION

To understand the controversy, one must first understand the history and purpose of the ministerial exception doctrine and hostile work environment

12. *Id.*
13. *Id.*
14. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).
15. *See id.*
16. *See Demkovich*, 3 F.4th at 984.
17. Rachel Casper, *When Harassment at Work is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J. L. & SOC. CHANGE 11, 29–32 (2021).
18. *See Hosanna-Tabor*, 565 U.S. at 181–87; *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020).
19. Casper, *supra* note 17, at 41.
20. *See Hosanna-Tabor*, 565 U.S. at 188–89.

claims independently and then jointly when analyzing the reasons for the circuit split.[21]

A. In the Beginning: The Roots of the Ministerial Exception and the Supreme Court's Expansion

Because the ministerial exception is not codified law, the most logical way to grasp the doctrine is by following its path through the circuit courts and the Supreme Court throughout the last few decades as they attempted to interpret the First Amendment's application in this area.[22]

1. History of the Courts' Decisions

The initial application of the ministerial exception provides the clearest interpretation of the doctrine's purpose even as it exists today.[23] The Court described the doctrine plainly: "[C]ourts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."[24] Essentially, this means that when a plaintiff files a claim involving their termination or a refusal to be hired (typically based on discrimination), if that person is deemed to be a "minister" according to the Court's guidance,[25] the employing religious organization may assert the affirmative defense of the ministerial exception to prevent governmental interference in this internal dispute.[26] The government has been especially interested in protecting religious entities since the nation's birth.[27] However, the special protection against discrimination claims was only added in the 1970s when the ministerial exception was first developed and applied in the courts.[28]

In *McClure v. Salvation Army*,[29] an ordained minister in the Salvation Army was fired after complaining that she was being paid less than the men in similar positions.[30] The minister brought an action against the Salvation Army, claiming that the organization had "engaged in discriminatory employment practices against her in violation of Title VII."[31] The Salvation Army initially tried to claim that it was not the minister's employer and she

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21. *See Demkovich*, 3 F.4th at 975.
22. *Our Lady of Guadalupe*, 140 S. Ct. at 2060–63.
23. *Id.* at 2060.
24. *Id.*
25. *See infra* text accompanying notes 42–62 (describing the Supreme Court of the United States' guidance on how to identify a minister).
26. *See infra* text accompanying notes 42–62 (describing the Supreme Court of the United States' guidance on how to identify a minister).
27. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 21 (2011).
28. *Id.*
29. McClure v. Salvation Army, 460 F.2d 553, 555 (5th Cir. 1972).
30. Lund, *supra* note 27, at 21.
31. *McClure*, 460 F.2d at 555.

was not its employee, claiming instead that the minister voluntarily agreed to perform work connected to the organization's religious activities.[32] The Salvation Army additionally argued that applying Title VII to the religious organization and minister relationship would violate the First Amendment's Religion Clauses, even if it was the minister's employer.[33] After determining that there indeed was an existing employer–employee relationship, the Fifth Circuit considered the risk to religious entities in these positions and determined that an exception was necessary because "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[34] In taking this position, the Fifth Circuit conclusively determined that applying the Title VII provisions that protect employees from harassment, discrimination, and abuse should not be applied to situations between ministers and their religious employers.[35] Therefore, the minister's claims were dismissed.[36] The Fifth Circuit's decision to exempt the Salvation Army from the litigation spurred other courts to begin developing their own versions of the ministerial exception.[37] With this decision eventually came significant disagreements about how far courts should expand the exception.[38]

Though circuit courts had invoked the ministerial exception for decades, the Supreme Court did not officially recognize the concept until it ruled on the case of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[39] In this decision, the Court recognized both the ever-present tension between church and state and the seemingly successful method that circuit courts had taken in recognizing and applying the ministerial exception.[40] The Supreme Court appeared to agree with the lower courts' decisions that the First Amendment "required a ministerial exception to certain state and federal employment claims brought by ministers against religious organizations."[41] Though the Court was quick to simply recognize and accept the ministerial exception, the question of whom exactly the exception would apply to remains unclear.[42]

In *Hosanna-Tabor*, a teacher at Hosanna-Tabor Evangelical Lutheran Church and School (Hosanna-Tabor) was designated a "commissioned

32. *Id.* at 555–56.
33. *Id.* at 556.
34. Lund, *supra* note 27, at 21 (quoting *McClure*, 460 F.2d at 558–59).
35. *McClure*, 460 F.2d at 560.
36. *Id.* at 561.
37. Lund, *supra* note 27, at 21–22.
38. *Id.* at 22.
39. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 118 (2012).
40. J. Gregory Grisham & Daniel Blomberg, *The Ministerial Exception After* Hosanna-Tabor*: Firmly Founded, Increasingly Refined*, 20 FEDERALIST SOC'Y REV. 80, 82 (2019).
41. *Id.*
42. *Hosanna-Tabor*, 565 U.S. at 190–91.

minister" after receiving a diploma of vocation.[43] This status allowed her to teach a variety of ages and subjects, including a religion class several times a week, as well as lead chapel, prayer, and devotional exercises.[44] During this time, the teacher was diagnosed with narcolepsy and had to go on disability leave for several months.[45] When the teacher informed the principal in January that she would return in February to finish out the year, the principal informed her that her position had been filled.[46] The school board urged the teacher to resign, stating concern about her physical capability to continue working, but the teacher refused and showed up to the school the very same day she was medically cleared to do so.[47] The teacher was accused of insubordination and disruptive behavior and was terminated within the next few weeks.[48]

Upon being terminated, the teacher filed a complaint with the Equal Employment Opportunity Commission (EEOC) for terminating her "in violation of the Americans with Disabilities Act of 1990," and the EEOC subsequently filed suit against Hosanna-Tabor.[49] Immediately, Hosanna-Tabor asserted the ministerial exception defense.[50] When the case eventually made it to the Supreme Court, the Court refused to apply a rigid formula to determine to whom the ministerial exception would apply.[51] Instead, the Court based its determination of what constitutes a minister on four factors: "(1) 'formal title,' (2) 'the substance reflected in that title,' (3) her 'use of th[e] title,' and (4) 'the important religious functions she performed.'"[52] Because the teacher possessed the title "Minister of Religion, Commissioned," taught religion, led prayers and devotionals, had extensive college-level education in religion, and made executive decisions in conducting chapel services, the Court concluded that she was a minister and therefore subject to the ministerial exception.[53] The Court's determination of such factors and its conclusion set a precedent that courts would follow for the next several years.[54] Being the seminal case on this matter, *Hosanna-Tabor* was the guiding light to determine an individual's ministerial status in the next important case, *Our Lady of Guadalupe School v. Morrissey-Berru*.[55]

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43. *Id.* at 178.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 178–79.
48. *Id.* at 179.
49. *Id.* at 179–80.
50. *Id.* at 180.
51. *Id.* at 190.
52. Grisham & Blomberg, *supra* note 40, at 82 (quoting *Hosanna-Tabor*, 565 U.S. at 192).
53. *Hosanna-Tabor*, 565 U.S. at 191–92.
54. *See* Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After* Hosanna-Tabor, 68 SMU L. REV. 1123, 1129–30 (2016).
55. *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

In *Our Lady of Guadalupe*, the Supreme Court ruled on two different cases, overturning the Ninth Circuit's ruling that the ministerial exception did not cover the two individual plaintiffs.[56] The first individual, Agnes Morrissey-Berru, was a lay teacher at Our Lady of Guadalupe School who taught students religion, lessons about the Bible, symbols and sacraments of the church, how to participate in mass, and recitation of prayers and creeds, among other secular subjects.[57] Despite Morrissey-Berru's assertions that she was adequately performing her job, the school moved her to a part-time position and then refused to renew her contract the following year, leading the lay teacher to file a claim with the EEOC based on age discrimination.[58] The second individual, the late Kristen Biel, was a lay teacher at a different Catholic primary school, St. James School.[59] St. James School had very similar teaching and faculty requirements as Our Lady of Guadalupe School, and therefore, Biel had very similar duties as Morrissey-Berru.[60] Coincidentally, Biel was also denied a contract renewal and filed a claim with the EEOC, asserting that she had been terminated "because she had requested a leave of absence to obtain treatment for breast cancer."[61] Both Our Lady of Guadalupe School and St. James School asserted the ministerial exception as a defense to these lawsuits, and the cases collectively appeared in front of the Ninth Circuit and later the Supreme Court.[62]

In deciding the two cases, the Ninth Circuit applied its own formula to determine the potential ministerial status of the teachers by focusing heavily on their lack of clerical titles and religious schooling.[63] The Ninth Circuit determined that the lack of these factors almost automatically threw out the possibility of invoking the ministerial exception along with its diminishment of the employees' religious duties.[64] However, whenever the Supreme Court took up the cases in *Our Lady of Guadalupe*, it reversed the Ninth Circuit's holding, stating that the Court had previously "declined to adopt a 'rigid formula' in *Hosanna-Tabor*, and the lower courts [had] been applying the exception for many years without such a formula. Here, as in *Hosanna-Tabor*, it is sufficient to decide the cases before us."[65] This conclusion signaled that the Court had not veered from its decision to avoid a rigid formula and made its position on such strict requirements clear.[66]

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56. *Id.* at 2066.
57. *Id.* at 2057.
58. *Id.* at 2057–58.
59. *Id.* at 2059.
60. *Id.*
61. *Id.*
62. *Id.* at 2059–60.
63. *Id.* at 2067–68.
64. *Id.*
65. *Id.* at 2069.
66. *Id.* at 2068.

2. The Purpose of the Exception

While the cases[67] described above provide a cohesive roadmap of the ministerial exception's history, it is important to grasp the exception's intended purpose to understand its recent controversies.[68] It may simply be said that the ministerial exception was born from the desired freedom of religion that the early colonists relentlessly fought for.[69] However, there is far more constitutional history to consider to paint the whole picture of why this issue is relevant today.[70] The ministerial exception revolves around the existence of the First Amendment, which was adopted to "foreclose the possibility of a national church."[71] To reflect this assertion, the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[72] As noted above, these initial parts of the First Amendment are known as the Religion Clauses, and each clause serves its own purpose.[73] In the most concise terms, the Establishment Clause "prevents the Government from appointing ministers," while the Free Exercise Clause "prevents [the Government] from interfering with the freedom of religious groups to select their own [ministers]."[74]

In recognizing the ministerial exception, the Supreme Court explained that the exception was necessary to keep the government from imposing an unwanted minister on the religious organization or punishing it for refusing to hire a potential candidate.[75] Allowing the government to have authority over such matters would directly interfere with the entity's internal governance and "right to shape its own faith and mission through its appointments," constituting an obvious violation of the Free Exercise Clause.[76] Hence, the Court found it necessary to implement the ministerial exception to protect religious entities in hiring and terminating ministers.[77] In addition, the Court acknowledged that without the ministerial exception, there was a danger of violating the Establishment Clause because the government might find ways to "determine which individuals will minister to the faithful" and therefore directly involve itself in protected ecclesiastical

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67. *See supra* Section II.A.1 (describing the history of the ministerial exception through the Supreme Court of the Unites States' decisions).

68. *See Our Lady of Guadalupe*, 140 S. Ct. at 2067–69.

69. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 183 (2012).

70. *Id.* at 183–84.

71. *Id.* at 183.

72. U.S. CONST. amend. I.

73. *See Hosanna-Tabor*, 565 U.S. at 183–84.

74. *Id.* at 184; *see supra* text accompanying note 33 (explaining the different clauses in the Religion Clauses).

75. *See Hosanna-Tabor*, 565 U.S. at 188.

76. *Id.*

77. *Id.*

decisions.[78] This concern falls under another doctrine known as the church autonomy doctrine, which prevents courts from ruling "on matters that are at the core of ecclesiastical concerns."[79] The Religion Clauses and the church autonomy doctrine all stem from the protection of religion guaranteed by the First Amendment.[80]

While *Hosanna-Tabor* and *Our Lady of Guadalupe* have been influential in identifying ministers, they did not provide substantial guidance on whether the ministerial exception applies to claims other than those dealing with the hiring or firing of ministers.[81] Hence, the circuit courts became split on whether the exception should be extended to issues during actual employment—including hostile work environment claims.[82]

B. Title VII and Hostile Work Environment Claims

Congress created Title VII to ensure the protection and integrity of employees in every area of employment.[83] The statute reads:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[84]

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court decided for the first time that discrimination constituting a violation of Title VII could result in a claim of a hostile work environment.[85] The Court specifically spoke to sexual harassment and sex-based discrimination, stating that "courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[86] The Court went on to reaffirm the standard set in *Meritor* in the 1993 case *Harris v. Forklift Systems, Inc.*[87] In *Harris*, the Court reaffirmed that Title VII is only violated "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's

78. *Id.* at 189.

79. George L. Blum, Annotation, *Application of First Amendment's "Ministerial Exception" or "Ecclesiastical Exception" to Federal Civil Rights Claims*, 41 A.L.R. Fed. 2d 445 § 18 (2009).

80. *Hosanna-Tabor*, 565 U.S. at 189.

81. *Id.* at 196.

82. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 984 (7th Cir. 2021).

83. Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e-2.

84. *Id.* § 2000e-2(a)(1).

85. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–67 (1986).

86. *Id.* at 66.

87. Harris v. Forklift Sys., Inc., 510 U.S. 17, 17 (1993).

employment and create an abusive working environment.'"[88] Given the Court's explanation of a violation, it is noteworthy that determining a violation is largely dependent on the facts and circumstances of each case.[89]

To determine whether religious entities and the Religion Clauses were subject to federal and state statutes, the Supreme Court created a test to analyze secular laws in *Lemon v. Kurtzman*.[90] This test mandates that "any state action must: (1) have a secular primary purpose, (2) not advance or inhibit religion, and (3) avoid excessive government entanglement with religion."[91] Before its current form, the *Lemon* test went through a variety of versions, leading to an unclear application.[92] This lack of clarity is also due to the debate about the inconsistency in the test's application.[93] The Court has not clarified this issue.[94] In fact, the Court has perpetuated the confusion by "sometimes entirely ignoring the [*Lemon*] test, while concurring justices noted its demise and heralded in a new era of Establishment Clause jurisprudence."[95] Yet, despite such declarations by justices and scholars, as well as circuit attempts to create new tests, the Court has continued to apply the *Lemon* test "in the vast majority of Establishment Clause cases."[96] Therefore, for now, it continues to play a role in considering the relationship between the ministerial exception, Title VII claims, and the Religion Clauses.

Similar to a violation of Title VII, to claim a hostile work environment, there are a number of factors that must be present and then evaluated in accordance with the circumstances of each case.[97] Just as in the process of determining a violation of Title VII, there is not an exact formula to pinpoint the validity of a hostile work environment claim.[98] Instead, courts look to a variety of factors such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," as well as an employee's psychological well-being.[99] Additionally, the court must evaluate the alleged harmful conduct on both a subjective and objective basis.[100] To satisfy the objective analysis, the conduct in question must be so severe or pervasive that it creates "an environment that a reasonable person would find hostile or abusive" to

88. *Id.* at 24 (quoting *Meritor*, 477 U.S. at 67).
89. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 984 (7th Cir. 2021).
90. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
91. Karthik Ravishankar, *The Establishment Clause's Hydra: The* Lemon *Test in the Circuit Courts*, 41 U. DAYTON L. REV. 261, 262 (2016).
92. *Id.* at 262–63.
93. *Id.*
94. *Id.* at 263.
95. *Id.*
96. Ravishankar, *supra* note 91, at 263.
97. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
98. *Id.*
99. *Id.*
100. *Id.* at 21–22.

fall within Title VII's purview.[101] Additionally, to satisfy the subjective analysis, the victim must "subjectively perceive the environment to be abusive" to constitute an alteration of "the conditions of the victim's employment," which, in turn, constitutes a Title VII violation.[102]

To further explain the intensity of harassment in the workplace in a case, courts acknowledge "tangible employment action[s]" when applicable.[103] This is a subtle but important concept in this Comment because a number of cases that have dealt with Title VII, hostile work environment claims, and the ministerial exception involve discussions of whether there are tangible or intangible employment actions being alleged.[104] The Supreme Court has defined a tangible employment action as involving "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[105] Because a tangible employment action involves such drastic acts surrounding the employment, it is unsurprising that this type of situation often results in economic harm to the employee.[106] Following that inference, it is also logical that "only a supervisor, or other person acting with the authority of the company, can cause this sort of injury."[107] Therefore, as a general principle, these types of actions fall only within "the special province of the supervisor."[108] Despite the distinction that the Supreme Court and circuit courts have made in harassment during employment actions, the Court did not note a difference in the pivotal ministerial exception cases, such as *Our Lady of Guadalupe* and *Hosanna-Tabor*.[109] However, the concept remains relevant here because of the opposing situation of alleged intangible employment actions in *Demkovich*.[110]

Taking this combination approach of factors and various types of workplace actions and applying both subjective and objective analyses allow courts to exercise discretion in determining whether the employee's claim has risen to the level of a Title VII violation and a hostile work environment claim.[111]

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101. *Id.* at 21.

102. *Id.* at 21–22.

103. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

104. *See infra* Section II.C (explaining the circuit split on whether the ministerial exception categorically bars hostile work environment claims).

105. *Burlington*, 524 U.S. at 761.

106. *Id.*

107. *Id.* at 762.

108. *Id.*

109. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 980 (7th Cir. 2021).

110. *Id.* at 974.

111. Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L. J. 1057, 1092 (2018).

C. The Circuit Split

Outside of the most recent Seventh Circuit decision in *Demkovich*, the Ninth and Tenth Circuits have released the most significant decisions on this matter, which created the circuit split.[112]

In the 1994 case *Bollard v. California Province of the Society of Jesus*, a novice in the Society of Jesus was sexually harassed by his superiors.[113] The novice alleged that the superiors "sent him pornographic material, made unwelcome sexual advances, and engaged him in inappropriate and unwelcome sexual discussions."[114] Though the novice reported these behaviors to other superiors within the Order, he saw no action and was eventually forced to leave because of the toll the harassment had taken on him.[115] The novice eventually asserted a complaint alleging a violation of Title VII after obtaining permission to do so from the EEOC.[116] The novice's claim was dismissed at the district level because that court determined that the ministerial exception was applicable.[117] The Ninth Circuit evaluated the dismissal of Bollard's claim only on the facts of the case and determined that the novice's claims did not run afoul of either the Free Exercise Clause or the Establishment Clause and therefore did not trigger the application of the ministerial exception.[118] More specifically, the Ninth Circuit found that "[t]he limited nature of the inquiry, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters."[119] This case-specific evaluation, paired with a balancing of church and state interests, led the court to determine that "the procedural entanglement between church and state that will result from allowing Bollard to pursue his claim is no greater than that attendant on any other civil suit a private litigant might pursue against a church."[120]

Next, in *Elvig v. Calvin Presbyterian Church*, an associate pastor at Calvin Presbyterian Church alleged that she was sexually harassed and subject to intimidating conduct by the church's primary pastor, which led to a hostile work environment.[121] After filing a complaint about this behavior with the church, the associate pastor saw no action taken and alleged that the primary pastor began to retaliate for the complaint "by relieving her of certain duties, verbally abusing her and otherwise engaging in intimidating

112. *Demkovich*, 3 F.4th at 984.
113. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).
114. *Id.*
115. *Id.*
116. *Id.* at 944–45.
117. *Id.* at 944.
118. *Id.* at 945–50.
119. *Id.* at 950.
120. *Id.*
121. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004).

behavior."[122] Finally, she filed a claim with the EEOC, which gave her the right to sue for the hostile work environment and later for unlawful retaliation.[123] Around this same time, the associate pastor was placed on unpaid leave and later terminated, which also prevented her from being able to acquire any other pastoral employment in any Presbyterian church.[124] The associate pastor later filed suit against the church for "sexual harassment, hostile work environment[,] and retaliation, all in violation of Title VII of the Civil Rights Act of 1964."[125] Though the district court initially dismissed her claims on the basis that they were barred by the ministerial exception, the Ninth Circuit disagreed, stating that "insulating the Church's employment decisions does not foreclose Elvig from holding the Church vicariously liable for the alleged sexual harassment itself, which is not a protected employment decision."[126] The court determined that, absent a religious or doctrinal justification for the conduct, the church could not assert the ministerial exception as an affirmative defense to bar the associate pastor's claims.[127]

These Ninth Circuit cases illustrate the court's position that these hostile work environment claims should be evaluated on each case's independent facts and with a balancing of interests as opposed to a categorical barring, which is the path the Tenth Circuit took on this issue.[128]

In contrast to the Ninth Circuit, in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, the Tenth Circuit held that a department director's claims of Title VII violations for "gender discrimination, disparate impact based on gender, and hostile work environment" were barred by the ministerial exception.[129] In that case, a director of the diocese was charged with a number of duties to oversee the function of the diocese, including supervising a number of ministry offices as well as teaching or facilitating a variety of religious courses.[130] The director claimed that she was given positive performance reviews but despite this was eventually terminated for what she alleged was age and gender discrimination.[131] After filing her lawsuit against the diocese, the diocese asserted the ministerial exception as a defense and was granted summary judgment.[132] On appeal, the Tenth Circuit chose to pinpoint the Ninth Circuit's opposing view and spoke directly against its approach.[133] The Tenth Circuit based its decision to allow the application of

122. *Id.* at 954.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 962.
127. *Id.* at 963.
128. *Id.* at 956; Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999).
129. Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1241 (10th Cir. 2010).
130. *Id.* at 1240.
131. *Id.* at 1240–41.
132. *Id.* at 1241.
133. *Id.* at 1245.

the ministerial exception on its understanding that allowing these claims would infringe the protections of religion set in place by the First Amendment. In explaining this conclusion, the court stated that:

> [A]ny Title VII action brought against a church by one of its ministers will improperly interfere with the church's right to select and direct its ministers free from state interference. Thus, we hold that because Appellant is a minister for purposes of this exception, her Title VII hostile work environment claim is barred.[134]

Through this holding, the Tenth Circuit affirmatively chose to adopt a categorical barring of these claims and set its own standard that the Seventh Circuit would eventually follow a decade later.[135]

The most recent case involving this issue and the one that brings about this Comment, *Demkovich v. St. Andrew the Apostle Parish*, deepened the circuit split on whether the ministerial exception bars hostile work environment claims during the course of employment.[136] In this case, Sandor Demkovich was a music and choir director of the St. Andrew the Apostle Parish and was subjected to derogatory and discriminatory comments about his sexuality and physical appearance by the priest of the parish.[137] These comments increased and became more hostile after the priest learned of the director's plan to marry his partner.[138] After the marriage took place, Demkovich was asked to resign.[139] When Demkovich refused to resign, he was later terminated by the priest.[140] Demkovich sued the church for violating Title VII, the Americans with Disabilities Act, and other state and county laws.[141]

The district court dismissed this initial complaint when the parish raised the ministerial exception; however, when the amended complaint was filed with allegations of a hostile work environment claim, the district court did allow the disability-based hostile work environment claims.[142] The district court reasoned that "[b]ecause Demkovich alleged intangible employment actions in his amended complaint, the ministerial exception was not a 'categorical bar' to his claims."[143] However, the district court held that the ministerial exception was still triggered because there were "concerns over excessive church-state entanglement."[144] In opposition to the Seventh

134. *Id.* at 1246.
135. *Id.* at 1245–46.
136. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 984 (7th Cir. 2021).
137. *Id.* at 973.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 974.
144. *Id.*

Circuit's later ruling on this case, the district court stated that the ministerial exception's application must be evaluated on a case-by-case basis when only intangible employment actions were alleged.[145] The district court found the ministerial exception applicable to this specific case, and it was quickly dismissed.[146]

Following the district court's dismissal, a motions panel for the Seventh Circuit was presented a controlling question of law by the district court: "Under Title VII and the Americans with Disabilities Act, does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?"[147] In taking up the appeal, the panel "affirmed the district court's decision denying dismissal of Demkovich's disability-based hostile work environment claim, and reversed its dismissal of his sex, sexual orientation, and marital status claims."[148] At this time, the Seventh Circuit had effectively determined that the ministerial exception would not bar Demkovich's hostile work environment claims that were based on the sexual harassment he had suffered.[149] However, on July 9, 2021, the Seventh Circuit heard the case en banc and held that "[a]djudicating a minister's hostile work environment claims based on interaction between ministers would undermine this constitutionally protected relationship."[150] Additionally, the Seventh Circuit stated that the ministerial exception was meant to "protect[] a religious organization's employment relationship with its ministers, from hiring to firing and the supervising in between."[151] Based on this reasoning, the Seventh Circuit reversed the dismissal of the disability-based claims and affirmed the dismissal of the sex-based hostile work environment claims.[152]

This ruling aligned the Seventh Circuit with the Tenth Circuit in the circuit split; however, not every judge was satisfied with this conclusion.[153] Seventh Circuit Judges Hamilton, Rovner, and Wood issued an extensive dissent in which they asserted that a cautious, case-by-case approach is more appropriate.[154] The dissent also cited and discussed the Ninth Circuit cases, *Elvig* and *Bollard*, to support their argument for a case-by-case analysis.[155] The purpose of discussing these cases and the Tenth Circuit case is to illustrate that the "circuit split is a sign that the question before us is not as

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 985.
151. *Id.*
152. *Id.*
153. *See id.* at 985–96.
154. *Id.*
155. *Id.* at 987–88.

easy as the majority presents it."[156] Besides the circuit split, the dissent also addressed several other problems found in the majority's opinion, including that the Supreme Court has not ruled on the issue, the production of an arbitrary line drawn in constitutional law, the distinction between tangible employment actions and hostile work environments, the balance between civil law and religious liberty, and the consequences of the decision.[157]

Though the Supreme Court allowed the application of the ministerial exception only in claims based upon firing and hiring circumstances, the Seventh Circuit decided *Demkovich* with the understanding that the exception extended beyond those circumstances and into the middle ground of this employment relationship, siding with the Tenth Circuit and directly opposing the Ninth.[158]

III. FIGHTING EXPANSION: WHY THE SUPREME COURT SHOULD RESTRAIN THE MINISTERIAL EXCEPTION TO PROMOTE THE WELFARE OF MINISTERIAL EMPLOYEES

To address the circuit split, the Supreme Court should grant a writ of certiorari and reverse the Seventh Circuit's holding in *Demkovich*—that hostile work environment claims are categorically barred by the ministerial exception—because courts should consider these claims on a case-by-case basis under a two-prong balancing test to protect ministerial employees while preserving the freedom of religious entities.[159]

A. The Conflict Between the Purpose of Title VII and the Potential for Religious Entity Immunity

The nature of the social and legal systems in the United States has forced courts to hold the necessity of civil law and the protection of religion in tension since the nation's beginning.[160] This tension has allowed religious entities to flourish in all their different forms while, at the same time, secular laws attempt to protect the rights of individuals who ensure the function and promote the mission of those entities.[161] The current circuit split concerning the applicability of the ministerial exception to hostile work environment claims threatens this balance.[162]

156. *Id.* at 987.
157. *Id.* at 985–96.
158. *Id.* at 983–84.
159. *See id.* at 985–86.
160. *Id.* at 991.
161. *Id.*
162. *Id.*

1. Title VII's Applicability to Religious Entities

Title VII's religious exemption aims to protect the rights of religious entities to employ people who align with their religious aspirations and ensure that these entities do not take advantage of employees by knowing they can act badly and avoid legal battles.[163] The legislative history of this statute indicates that the purpose of the exemption was to be a narrow application, which is in direct contrast with how religious entities have asserted the exemption.[164] In enacting the Civil Rights Act of 1964, Congress specifically created Title VII to protect all employed individuals from discrimination, which includes protection from harassment.[165] However, the true intent of Congress, as far as it relates to religion, was revealed when a congressional debate record stated that the antidiscrimination provisions are applicable to religious employers, except in the case of discrimination based on religion.[166] Understanding Congress's intent to ensure that even those employed by religious entities are protected from discrimination gives merit to the fact that Congress never meant for ministerial employers and employees to be entirely immune from litigation.[167] It was the courts, as opposed to Congress, that began expanding the idea that ministers and religious entities should be exempt from discrimination and tort claims to protect the organizations under the Religion Clauses.[168] In taking this task upon themselves, courts have attempted to protect religious entities by allowing the expansion of the ministerial exception to such a fault that they have ignored the original intent and purpose of Title VII.[169]

The 1972 amendment to Title VII—allowing discrimination of religious entities based on their religious beliefs—allowed for leeway in the hiring and termination of certain individuals to ensure that employees align with the entity's beliefs.[170] While this alteration paired nicely with the protection of religious freedom, it has opened the door for courts to improperly dismiss Title VII claims, which is the issue that stands today as federal appellate courts have categorically dismissed hostile work environment claims.[171] This is where the *Lemon* test is vital in analyzing the secular law of Title VII to determine if the acts of religious entities and the Religion Clauses are

163. Casper, *supra* note 17, at 26–27.

164. H.R. REP. NO. 88-914, at 2401 (1964), *reprinted* in 1964 U.S.C.C.A.N. 2391, 2401.

165. *Id.*

166. 110 CONG. REC. 12,812 (1964).

167. Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After* Hosanna-Tabor, 11 STAN. J. C.R. & C.L. 89, 93–94 (2015).

168. *Id.* at 94.

169. *See id.* at 94–95.

170. Jeremy Weese, *The (Un)holy Shield: Rethinking the Ministerial Exception*, 67 UCLA L. REV. 1320, 1373–74 (2020).

171. *See id.*

subjected to the law.[172] So long as the Supreme Court upholds the application of the *Lemon* test, Title VII claims should be allowed to, at the very least, be asserted against a religious entity because this statute passes the test, as described below.[173]

In considering Title VII under the *Lemon* test, the law must have a primarily secular purpose, not advance or inhibit religion, and avoid excessive governmental entanglement with religion.[174] First, Title VII does have a secular legislative purpose, which is "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."[175] The primary effect of Title VII is to provide a remedy for those who face discrimination.[176] The amended version of the statutory text specifically aimed to "allow[] religious employers to be sued for all types of discrimination, except religious discrimination."[177] Second, this effect is neither meant to advance nor inhibit religion but to promote the protection of employees while also allowing religious organizations the right to discriminate in alignment with their doctrines and beliefs in hiring and terminating.[178] While the opposing argument may be that this gives aid to a religious mission, the stronger interpretation is that this exception allows for the very narrow allowance of religious entities to do exactly what they were created and designed to do—exercise religious freedom.[179] Finally, Title VII, and especially the religious exception, has not fostered excessive government involvement with religion; in fact, Congress actively tried to avoid this by amending the provision to allow for religious discrimination.[180]

The *Lemon* test is vulnerable to each law and case that comes into question because it, like all doctrines and tests, is not perfectly fit for every scenario the courts will encounter.[181] However, Title VII is a vital tool for employees to protect themselves, and the *Lemon* test is essential in illustrating its relationship to the Establishment Clause.[182] Because Title VII passes the *Lemon* test, claims of Title VII violations and hostile work environment claims should not be categorically barred.[183] These claims must be evaluated on their individual facts and allegations before a court can

172. *See* Ravishankar, *supra* note 91, at 265–66; *see also* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (creating the *Lemon* test to avoid state entanglement issues).

173. Ravishankar, *supra* note 91, at 265–66.

174. *Id.* at 265.

175. H.R. REP. NO. 88-914, at 2401 (1964), *reprinted* in 1964 U.S.C.C.A.N. 2391, 2401.

176. *Id.*

177. Levinson, *supra* note 167, at 93.

178. *Id.* at 93–94.

179. Ravishankar, *supra* note 91, at 300.

180. *Id.*

181. *Id.* at 300–01.

182. *Id.*

183. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 993 (7th Cir. 2021) (Hamilton, J., dissenting).

immediately determine that adjudication would violate the Free Exercise Clause or Establishment Clause.[184] Congress specifically intended for Title VII to protect all employees, not to leave ministerial employees entirely without remedy when they are harmed.[185]

2. Overturning Demkovich *and Preserving Title VII's Purpose*

In *Demkovich*, the Seventh Circuit confronted the question of whether the ministerial exception barred a hostile work environment claim brought by a minister involving sexual harassment under Title VII "even if the claim does not challenge a tangible employment action."[186] This is an essential point in this case because the parish argued that its power as Demkovich's employer "to take tangible employment actions against ministerial employees does not give them enough power to select, supervise, and control those employees."[187] The implication is that harassment in this type of religious workplace should fall under the necessary control and supervision of employees instead of being recognized as the manipulative and plainly tortious act that it is.[188]

Furthermore, in ultimately deciding that these claims should be categorically barred, the Seventh Circuit ignored the essence and purpose of Title VII.[189] The Seventh Circuit claimed that its decision was rooted in the Supreme Court's holdings in *Hosanna-Tabor*[190] and *Our Lady of Guadalupe*[191] in which the fact patterns involved discrimination solely in the context of terminating ministers.[192] The Seventh Circuit acknowledged this context yet still asserted that the ministerial exception's protection extends over the entire employment relationship.[193] By pushing the limits of the Supreme Court's precedent, the Seventh Circuit blatantly ignored the intention of Title VII and the purpose of the ministerial exception.[194] Additionally, the Seventh Circuit's decision seems hasty and too simple given its direct opposition to its panel's previous decision only a year before and the basic fact that there is a circuit split.[195] Circuit splits are created because of intensely debated legal issues, and the Seventh Circuit's decision

184. *Id.* at 991.
185. Casper, *supra* note 17, at 7.
186. *Demkovich*, 3 F.4th at 974.
187. *Id.* at 990.
188. *Id.* at 990–91.
189. *Id.* at 983–84.
190. *Id.* at 976; *see generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).
191. *Demkovich*, 3 F.4th at 976; *see generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
192. *Demkovich*, 3 F.4th at 977.
193. *Id.* at 977–78.
194. *Id.* at 983.
195. *Id.* at 987.

to simply bar a vast number of claims does not appear to reflect the weight of the issue.[196] Furthermore, the Religion Clauses serve to preserve religious entities' rights to control whom they hire and terminate.[197] The conduct that victims like Demkovich have experienced does not fall under such rights.[198]

Ultimately, the Supreme Court should reverse *Demkovich* because the Seventh Circuit's majority held that, as a rule, the potential for excessive entanglement through adjudicating these claims should categorically prevail over the significant societal interest in protecting employees from discrimination.[199] Such a broad statement runs afoul of the intention for civil and religious matters to coexist and be balanced when people involved in both sectors are affected.[200]

B. A Case-by-Case Approach Promotes Protection of Religion and Employees

In choosing to categorically bar hostile work environment claims through the ministerial exception, courts have either completely ignored or failed to effectively account for the welfare of those employed by such religious entities.[201]

Applying a case-by-case analysis to hostile work environment claims between ministers will protect the interests of employees who have the right to a safe work environment and prove that the work environments of religious entities impact their employees just as environments do in any secular employment industry.[202] In ruling to bar these claims categorically, courts like the Seventh and Tenth Circuits have chosen to place those with power in religious entities above the law, regardless of the facts presented in each case.[203] To reverse this power imbalance, courts must instead turn to a case-by-case approach.[204] Applying a case-by-case approach does not insinuate that every claim will be void of entanglement; rather, it gives the court system the opportunity to effectively evaluate both the victim and the religious entity without automatic dismissal simply because the victim holds a particular title, performs certain duties, or has a particular type of education.[205] Courts must lean into the concept that, in dealing with any religious-based case, there is always potential for entanglement.[206] But, just

196. *Id.*
197. *Id.* at 994.
198. *Id.*
199. *Id.*
200. *Id.* at 988.
201. *Id.* at 989–90.
202. Casper, *supra* note 17, at 40.
203. *Demkovich*, 3 F.4th at 990–91 (Hamilton, J., dissenting); Weese, *supra* note 170, at 1357.
204. Casper, *supra* note 17, at 27.
205. *Id.*
206. *Id.*

as this potential has not stopped courts from adjudicating cases about religious symbolism and public prayers, it should not stop courts from valuing the importance of, at least, evaluating each case of harmed ministerial employees on its own facts.[207]

Additionally, the Supreme Court's precedent does not suggest that the First Amendment clauses should go so far in protecting religious entities that individuals can harm others without consequences along the way.[208] Instead, the Religion Clauses serve to protect religious liberty while also refraining from granting special privileges to religious organizations.[209] If a court can neutrally analyze the facts of each hostile work environment claim with consideration of the equally important Religion Clauses and Title VII, both the harmed employee and the religious entity, which is likely interested in protecting itself, will have the opportunity to defend and advocate for themselves.[210] Also, the Supreme Court has refused to extend the ministerial exception as far as the Tenth and Seventh Circuits have.[211] In disregarding this precedent and instead promoting a broad interpretation of the exception, circuit courts especially may do more damage to religious entities than help them.[212]

In dissenting to the decision in *Our Lady of Guadalupe*, Justice Sotomayor and Justice Ginsburg noted the potential for inviting abuse through the Court's conclusion, which circuit courts using the ministerial exception had also warned about for decades.[213] *Our Lady of Guadalupe* was based on facts that dealt solely with the termination of two ministerial employees.[214] Even within this context, which was undoubtedly covered by the ministerial exception, the Court expressed concern about the potential for letting religious entities off the hook of liability too easily.[215] In the dissent, Justice Sotomayor explained the impact of the Court's decision and wrote that "the Court absolves religious institutions of any animus completely irrelevant to their religious beliefs or practices and all but forbids courts to inquire further about whether the employee is in fact a leader of the religion."[216] With hostile work environment claims now at issue, there is even more potential for courts to view religious entities as superior to the people, and their rights, who work within them.[217] These religious entities have long

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207. *Id.*
208. *Id.* at 40–41.
209. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 986 (7th Cir. 2021).
210. *Id.* at 986.
211. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).
212. Casper, *supra* note 17, at 40–41.
213. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2077 (2020) (Sotomayor, J., dissenting).
214. *Id.* at 2056–60.
215. *Id.* at 2077.
216. *Id.*
217. *Id.* at 2082.

been held accountable for the criminal and tort claims brought by nonministerial employees and those outside of the church.[218] With this fact in mind, there is a strong argument that the harassing behavior that ministerial victims have experienced is the same type of behavior that makes religious entities liable for tortious actions.[219] Because behavior against nonministerial victims is arguably similar to that against ministerial victims, it is unlikely that, without categorically barring ministerial claims, one would raise a First Amendment issue.[220] Put simply, allowing the adjudication of ministerial victims' claims does not subject religious entities to any further potential entanglement or interference than they are already subject to in nonministerial cases.[221]

Considering the interests of all involved, it is in the best interest of not only employees bringing Title VII claims but also of religious entities for the Supreme Court to overturn *Demkovich* and set a precedent for a case-by-case analysis of hostile work environment claims to ensure equal opportunity for representation and testimony.[222]

IV. A CASE-BY-CASE EVALUATION OF HOSTILE WORK ENVIRONMENT CLAIMS THROUGH A TWO-PRONG TEST

To effectively decide if adjudication of these hostile work environment claims is appropriate, courts need a model that will allow them to objectively analyze these claims on a case-by-case basis and determine whether they should be barred by the ministerial exception.[223] This section presents a two-prong analysis that courts should use to evaluate each case that presents a potential for ministerial exception application.[224] First, courts should decide if the parties involved fall under the status of a minister.[225] Second, if the courts find that parties are ministers, the courts should consider if adjudicating the claim would violate either the Free Exercise Clause or the Establishment Clause.[226]

218. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 994 (7th Cir. 2021) (Hamilton, J., dissenting).

219. *Id.*

220. *Id.*

221. *Id.*

222. Casper, *supra* note 17, at 42.

223. *See id.*

224. *See infra* text accompanying notes 225–50 (explaining how a two-prong test of hostile work environment claims in the ministerial context would operate).

225. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

226. *Id.*

A. Identification of Employee Status in Hostile Work Environment Claims Potentially Subject to the Ministerial Exception

The first and most basic component in analyzing whether the ministerial exception is an affirmative defense is determining if the parties involved are ministers according to case law precedent.[227] The history of determining an employee's status as a minister is convoluted and lacks a strict analytical formula or structure.[228] Undoubtedly, it is difficult to determine, given the plethora of religious entities and doctrines across the nation, which titles should be considered "ministerial" enough to be categorized as parties subject to the ministerial exception.[229] If a court must parse through a number of religious titles and education statuses among teachers, directors, preachers, clergy, ministers, and others to determine if the ministerial exception protects that person, it risks including some and excluding others based solely on an outsider's perspective.[230] It would be ignorant to assume that a court can learn everything it needs to know about the inner workings of any given religious entity to decide within the time limits of litigation.[231] However, at the same time, courts need to incorporate an objective approach to take as a first step in analyzing whether the ministerial exception should apply.[232] Given the time and knowledge constraints, this approach must not be rigid but should still be concise and thoughtful of all circumstances surrounding the claim.[233]

Being objective while remaining sensitive to a religious entity's inner workings and beliefs is the balance courts must strike when evaluating the status of parties involved in litigation that has potential for application of the ministerial exception.[234] The most effective way to accomplish this balance is for courts to analyze parties' actions and responsibilities as opposed to what the entity has titled them.[235] The Supreme Court has explicitly rejected the application of a rigid formula to evaluate whether an employee is a minister,[236] so an analysis of the totality of the circumstances and actions is the most sensible approach.[237]

Without a formula or direct guidance, courts are forced to rely solely on their own discretion, which will continually produce inconsistent results.[238] Though the Supreme Court rejects a rigid formula, one question is vital to

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227. *Id.*
228. *Id.* at 2062.
229. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 200 (2012) (Alito, J., concurring).
230. *Id.*
231. *See Our Lady of Guadalupe*, 140 S. Ct. at 2064.
232. *Id.* at 2064–65.
233. *Id.* at 2069.
234. *Id.* at 2064–65.
235. Murray, *supra* note 54, at 1152.
236. *See Our Lady of Guadalupe*, 140 S. Ct. at 2069.
237. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).
238. *Id.* at 192–93.

determining ministerial status—whether the employee has performed a religious function instructed by the religious entity in furtherance of its religious mission.[239] After the court answers this question, the court should consider a number of factors listed by the Supreme Court that will solidify the employee's status.[240] Such factors include history of religious education, self-description in the religious entity, title given by the entity, daily tasks and responsibilities, and role in delivering the entity's message or purpose.[241] An additional significant factor in considering ministerial status is the "religious characteristics of an entity, and how that entity seeks to act as an institutional whole."[242] While this may shed light on the reason behind the employee's performance of a religious function, a religious entity's mission and how it is carried out only serves as an explanation.[243] Plenty of people who attend or hold membership in religious entities do acts that promote the mission of their affiliated place, yet, they are not employed by the entity.[244] Further, certain entities refrain from spreading a message about their mission whatsoever, making the religious characteristics' correlation to ministerial status moot.[245]

Given all these considerations, the Supreme Court was correct to avoid a rigid formula given the extensive religious diversity and the convoluted nature of understanding each individual religious entity's functions and operations.[246] However, some structure is necessary.[247] For instance, a court facing one of these claims must first determine through the facts whether the employee has been instructed and has continuously performed a religious function within the parameters of their employment that furthers the mission of the religious entity.[248] This initial determination will allow a court to further examine the other factors and circumstances mentioned more thoroughly.[249] Using such a broad scope will result in an analysis that encompasses far more concrete facts and understanding of the individual's role as opposed to simply reading a title and allowing whatever interpretations may follow.[250]

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239. *See Our Lady of Guadalupe*, 140 S. Ct. at 2064.

240. *Id.* at 2068.

241. *Id.* at 2063–64, 2068.

242. Murray, *supra* note 54, at 1148.

243. Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 FEDERALIST SOC'Y REV. 244, 253 (2021).

244. Murray, *supra* note 54, at 1148.

245. *Id.* at 1149.

246. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).

247. Murray, *supra* note 54, at 1149.

248. Weese, *supra* note 170, at 1359–62; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2073 (2020).

249. *See Our Lady of Guadalupe*, 140 S. Ct. at 2073–74.

250. *Id.* at 2063–64.

B. Analyzing a Case-by-Case Approach of a Claim

The recent ruling by the Seventh Circuit in *Demkovich* deepened the circuit split on this issue by dangerously holding that hostile work environment claims should be categorically barred by the ministerial exception.[251] To better protect the freedom of religious entities and the welfare of American employees, the courts must instead turn to a case-by-case approach when evaluating these hostile work environment claims.[252] Because the ministerial exception flows from the Free Exercise Clause and the Establishment Clause, the most persuasive argument to categorically bar hostile work environment claims is that adjudicating them disrupts the doctrine of church autonomy ingrained by these clauses and the precedent of the Supreme Court.[253] However, the Religion Clauses do not make religious entities entirely immune from litigation but rather should be used as a baseline or starting point to determine if a religious entity is subject to excessive entanglement or inference.[254] As the Supreme Court itself has noted, "the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[255] By evaluating claims on a case-by-case basis, courts will provide the appropriate respect and influence to the Religion Clauses but will serve only as a baseline for potential barring, not as a categorical answer to hostile work environment claims.[256] Analyzing the potential for violation of these clauses gives a clear answer on whether the ministerial exception should bar the claim or not.[257]

1. The Free Exercise Clause

The Supreme Court provided a narrow definition of what the Free Exercise Clause protects, and this interpretation does not allow much room for the ministerial exception to bar a claim involving the middle part of employment.[258] In *Hosanna-Tabor*, the Court stated that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its appointments."[259] So the question for the Court is: will adjudicating this hostile work environment claim inhibit a religious entity's right and ability to choose its own employees as part of shaping its purpose? If yes, parties may assert the ministerial exception as an affirmative defense

251. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 984–85 (7th Cir. 2021).
252. *Id.* at 996 (Hamilton, J., dissenting).
253. *Id.* at 975–76.
254. *Id.* at 989 (Hamilton, J., dissenting).
255. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 (2012).
256. *See Demkovich*, 3 F.4th at 996 (Hamilton, J., dissenting).
257. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–64 (2020).
258. *Hosanna-Tabor*, 565 U.S. at 188.
259. *Id.*

and the claim should be barred accordingly.[260] However, if the answer is no, the evaluation poses a similar question regarding the Establishment Clause.[261]

The most logical first step a court should take is to determine whether the hostile work environment claim will impede a religious entity's right to hire its choice of ministers.[262] The majority in *Demkovich* insists that "a hostile work environment claim brings the entire ministerial relationship under invasive examination."[263] Before jumping to a similar extreme mindset, courts should consider that religious entities are not immune from several other civil suits and nonministerial claims.[264] Would a hostile work environment claim resulting from a Title VII violation among ministers cause equal or greater interference than the interference already necessary in these other claims? Those who lean toward "no" likely draw this response from the idea that a claim between ministers would cause more interference in evaluating an entity's religious-based decisions in employing their ministers than an ordinary civil or nonministerial claim.[265] Such a response would be valid given the simple nature that ministers would be the parties involved in the claim in question.[266] However, this test of violating the Free Exercise Clause will ultimately fall back on the facts of the case and whether a court foresees that these facts will constitute any more investigative inference than other claims the religious entity is, or could be, already subjected to.[267] The Free Exercise Clause cannot be so far extended that a court ignores the purpose interpreted by the Supreme Court.[268]

2. The Establishment Clause

Because courts have placed a greater emphasis on the potential violation of the Establishment Clause, this component of the test is crucial and more complex.[269] To align with the Establishment Clause, Title VII "must have a secular legislative purpose," its primary effect must not advance nor inhibit religion, and it "must not foster 'an excessive government entanglement with religion.'"[270] Because it is established that Title VII does have a secular legislative purpose of protecting employees from discrimination and

260. *See Demkovich*, 3 F.4th at 991–93.
261. *Id.*
262. *Id.* at 990.
263. *Id.* at 983.
264. Casper, *supra* note 17, at 31.
265. *Id.*
266. *Id.*
267. *Id.* at 31–32.
268. *Id.*
269. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 993 (7th Cir. 2021) (Hamilton, J., dissenting).
270. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

harassment, and its primary effect does not advance or inhibit religion itself, the most important component here is for a court to determine if a Title VII claim leads to excessive entanglement.[271]

The majority in *Demkovich* claimed that a hostile work environment claim "would enmesh the court in endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus."[272] Such a categorical statement blatantly ignores the purpose of the Establishment Clause and Title VII.[273] The dissenting opinion in *Demkovich* acknowledged that some entanglement is essentially unavoidable when adjudicating claims in the secular courts that arise from religious institutions.[274] However, instead of automatically assuming that adjudicating a hostile work environment claim would violate the Establishment Clause, the courts should consider these claims on a case-by-case basis by balancing the factors and circumstances that may or may not lead to excessive entanglement.[275]

In evaluating the applicability of the ministerial exception, courts should analyze whether there is a risk of excessive entanglement both procedurally and substantively.[276] First, the potential for excessive procedural entanglement should be determined by the risk of the courts or the government in general "prob[ing] the mind of the church," allowing far-reaching remedies, and continuing surveillance into the church's functions after the potential judgment.[277] For instance, in *Bollard v. California*,[278] the Ninth Circuit evaluated a hostile work environment claim from a Title VII violation to determine if adjudicating it would lead to excessive procedural entanglement.[279] The court considered the remedies the plaintiff sought, whether it would need to evaluate the religious doctrine or reasonableness of practices, and what kind of judgments the jury would have to make about the nature of the alleged harassment.[280] There, the Ninth Circuit concluded that because the plaintiff sought only damages (as opposed to an equitable relief that would constitute continued surveillance), only a restricted inquiry into the entity's reasonable prevention was necessary, and the jury only needed to make "judgments about the nature and severity of the harassment."[281] Accordingly, the Ninth Circuit held that the Establishment

271. *Demkovich*, 3 F.4th at 991–93 (Hamilton, J., dissenting).
272. *Id.* at 981 (quoting Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003).
273. *Id.*
274. *Id.* at 991.
275. *Id.* at 992.
276. *Id.* at 991 (citing Agostini v. Felton, 521 U.S. 203, 233 (1997)).
277. *Id.* at 991–92.
278. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999).
279. *Id.* at 949–50.
280. *Id.* at 950.
281. *Id.*

Clause was not violated by the adjudication of the hostile work environment claim and that the ministerial exception was not applicable.[282]

As in the Ninth Circuit, courts should take the initiative to determine whether the adjudication of these hostile work environment claims violate the Establishment Clause by analyzing the same factors: remedies, type of inquiry, types of jury considerations, etc.[283] This will allow courts to determine if adjudicating such a claim would lead to procedural entanglement and therefore be barred by the ministerial exception or not.[284]

In evaluating the potential for substantive entanglement, the court faces a more difficult analysis, but its focus must remain on whether the potential for entanglement is excessive.[285] When there is potential for substantive entanglement, the risks are a religious entity's freedom to choose or terminate its ministers, discern its ministers' ability to perform in their roles, and determine the validity of the beliefs and practices.[286] Courts should consider whether the actions violate the Establishment Clause and, therefore, if one can assert the ministerial exception, by evaluating the potential for these types of intrusions as opposed to assuming that the violation will occur.[287] The Ninth Circuit has proven that analyzing and balancing the risks listed above is an effective method to discern whether adjudication violates the Establishment Clause.[288] The Court must determine whether the actions alleged, according to the facts, are so related to the practices of the religious entity that it would be impossible for the court to adjudicate and not pry into the practices and beliefs of the ministers and the religious entity, leading to continued surveillance that prevents the entity's free exercise.[289]

V. CONCLUSION

Since the 1970s, the ministerial exception has played a significant role in protecting religious entities from governmental interference.[290] But, as it became more frequently used and morphed by the circuit courts, it has lost its true form and purpose.[291] Instead, it now serves as the perfect way for religious entities to automatically avoid lawsuits.[292] The circuit split,

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282. *Id.*

283. *Id.*

284. *Id.*

285. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 993 (7th Cir. 2021) (Hamilton, J., dissenting).

286. *Bollard*, 196 F.3d at 940; Demkovich v. St. Andrew the Apostle Par. (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020), *and on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021).

287. Casper, *supra* note 17, at 34.

288. *See Bollard*, 196 F.3d at 944–45.

289. Casper, *supra* note 17, at 34.

290. Esbeck, *supra* note 243, at 250–51.

291. *Id.*

292. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 995 (7th Cir. 2021) (Hamilton, J., dissenting).

particularly the most recent decision in *Demkovich*, has revealed a unique issue that courts now must face when presented with hostile work environment claims between ministers.[293] The only solution is for the Supreme Court to take up this case and set a precedent for a case-by-case analysis of these claims.[294] This approach is the only way to ensure that the government, and especially the courts, give respect to the testimonies of both religious entities and their employees.[295] As richly diverse in religious and nonreligious citizens as the United States is, it is imperative that the Supreme Court take steps to ensure that it hears all voices before automatically throwing out claims of abuse, harassment, or discrimination.[296]

293. *Id.* at 985.
294. *See id.* at 986.
295. *See id.*
296. *See id.*